Loh Teck Wah v Fintree Capital Sdn Bhd (PNL Capital Sdn Bhd & Ors, interveners)

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-28JM-1–01 OF 2021
NADZARIN WOK NORDIN JC
8 JUNE 2021

Companies and Corporations — Judicial management — Applicant applied for judicial management order pursuant to s 405 of Companies Act 2016 — Intervener opposed to application — Whether applicant was creditor of respondent — Whether applicant was bona fide in making application — Whether interim judicial manager acted in favour of applicant — Whether application should be separated from other legal proceedings — Whether application ought to be allowed — Companies Act 2016 s 405

The respondent, Fintree Capital Sdn Bhd ('Fintree'), had one shareholder and one director ie Liew Chia Soon ('Liew'), who was the sixth intervener. The first to fifth interveners were companies incorporated under the Companies Act 1965. The applicant had obtained an ex parte order to appoint one interim judicial manager ('IJM'). A suit ('Suit 623') was filed by the first to fifth interveners against Fintree and Liew. Two consent judgements had thereafter been entered, one between Liew and the first to fifth interveners, and a second one between Fintree (with Liew acting on its behalf) and the first to fifth interveners, which essentially admitted the allegations by the first to fifth interveners against Liew and Fintree ('the consent judgments'). The applicant commenced an originating summons to set aside the consent judgements. The IJM had also commenced proceedings via an originating summons to set aside the consent judgements on the grounds, inter alia, that they were obtained after the judicial management moratorium had taken effect. The applicant was informed by Liew that the first to fifth interveners had taken out an Anton Piller order on an ex parte basis against Liew and Fintree via Suit 623. By way of an originating summons ('the application'), the applicant had applied to this court to place Fintree under judicial management pursuant to s 405 of the Companies Act 2016. The first to fifth interveners via encl 64 and the sixth intervener via encl 24 had also moved this court to set aside the IJM order and dismiss the application.

Held, allowing the application:

(1) The applicant had the locus standi to commence the application as he had on a balance of probabilities proven that he was a creditor of Fintree.

Therefore the first to fifth interveners' contention that the sum of RM200,000 was advanced by the applicant to Liew, which made him a creditor to Liew and not to Fintree was untenable. The fact that the applicant had not produced any statement of account or balance sheet as evidence that he was recorded as a 'creditor' was unacceptable due to the documents of Fintree now being in the possession of the first to fifth interveners as a result of the Anton Piller order (see paras 61–63).

(2) The applicant did not use the application and the IJM to set aside the consent judgment to protect himself from actions being taken by the first to fifth interveners. It was highly probable that the applicant had filed the application due to his main concern that there was no one at the helm protecting the interests of Fintree, and that he did not intend to stifle Suit 623, as he had offered to undertake that he would not object to any application by the first to fifth interveners to continue the proceedings in Suit 623. The applicant could not have been aware of the consent judgements as the same contained some serious allegations against him which he would not have consented to their wording had he known of the said consent judgement. Therefore, the application was bona fide and that there had been no abuse of process by the applicant in making the application. The application was not filed for collateral purposes and there was no mala fides in obtaining the IJM order and/or making the application (see paras 65–68).

(3) The IJM had not been acting in concert with or in favour of the applicant to pursue his alleged agenda as contended to by the first to fifth interveners and the IJM had acted objectively and independently as it was perfectly reasonable for the IJM to file an application to set aside the consent judgment entered between the first to fifth interveners and Fintree, followed by an originating summons when the court in Suit 623 refused to stop or delay sealing of the consent judgments due to the moratorium effect under s 410(c) of the Companies Act 2016 (see para 69).

(4) The application should be separated from the ongoing dispute between directors and shareholders of the PNL Group of companies as they were not factors to be taken into consideration for the purposes of ss 405 and 406 of the Companies Act 2016 in granting a judicial management order. The issue of whether Fintree's business was to be said to be illegal was not for this court to decide as there were various other legal proceedings in the other courts for the same to be determined and that there was at present no finding of Fintree's business as being illegal (see paras 70–71).

(5) Although Fintree appeared to be temporarily insolvent, there was a strong possibility of Fintree expecting to receive a substantial cash inflow from the many ongoing contracts and therefore with the making of the judicial management ('JM') order, Fintree would more probably than not be able

fulfil the purpose of 'likely to achieve one or more of the purposes' as provided for in s 405(1)(b) of the Companies Act 2016. Fintree would on a balance of probabilities be able to settle the outstanding debt owed to its creditors and continue as a going concern if a JM order was made. The liabilities of Fintree appeared to far exceed its assets and Fintree could not in its current state settle its debts and liabilities. The financial return to Fintree's creditors would be better if the JM order was allowed as compared to a winding up situation. The possibility of an alternative remedy was by itself not a ground for the court to dismiss a judicial management application (see paras 76 & 78).

[Bahasa Malaysia summary

Responden, Fintree Capital Sdn Bhd ('Fintree'), mempunyai seorang pemegang saham dan seorang pengarah iaitu Liew Chia Soon ('Liew'), yang merupakan pencelah keenam. Pencelah pertama hingga kelima adalah sykt yang diperbadankan di bawah Akta Syarikat 1965. Pemohon telah mendapat perintah ex parte untuk melantik seorang pengurus kehakiman interim ('IJM'). Satu guaman ('Guaman 623') telah difailkan oleh pencelah pertama hingga kelima terhadap Fintree dan Liew. Dua penghakiman persetujuan telah dimasukkan selepas itu, satu antara Liew dan pencelah pertama hingga kelima, dan yang kedua antara Fintree (dengan Liew bertindak bagi pihaknya) dan pencelah pertama hingga kelima, yang pada dasarnya mengakui dakwaan oleh pencelah pertama hingga kelima terhadap Liew dan Fintree ('penghakiman persetujuan'). Pemohon memulakan saman pemula untuk mengetepikan penghakiman persetujuan. IJM juga telah memulakan prosiding melalui saman pemula untuk mengetepikan penghakiman persetujuan atas alasan, antara lain, bahawa ia diperoleh selepas moratorium pengurusan kehakiman berkuat kuasa. Pemohon dimaklumkan oleh Liew bahawa pencelah pertama hingga kelima telah mengeluarkan perintah Anton Piller secara ex parte terhadap Liew dan Fintree melalui Guaman 623. Melalui satu saman pemula ('permohonan'), pemohon telah memohon kepada mahkamah ini untuk meletakkan Fintree di bawah pengurusan kehakiman menurut s 405 Akta Syarikat 2016. Pencelah pertama hingga kelima melalui lampiran 64 dan pencelah keenam melalui lampiran 24 juga telah memohon kepada mahkamah ini untuk mengetepikan perintah IJM dan menolak permohonan itu.

Diputuskan, membenarkan permohonan:

(1) Pemohon mempunyai locus standi untuk memulakan permohonan kerana dia telah membuktikan atas imbangan kebarangkalian bahawa dia adalah pemiutang Fintree. Oleh itu, pertikaian pencelah pertama hingga kelima bahawa sejumlah RM200,000 telah didahulukan oleh pemohon kepada Liew, yang menjadikannya pemiutang kepada Liew dan bukan kepada Fintree tidak dapat dipertahankan. Hakikat bahawa pemohon tidak mengemukakan sebarang penyata akaun atau penyata imbangan

sebagai bukti bahawa dia telah direkodkan sebagai 'pemiutang' adalah tidak boleh diterima kerana dokumen Fintree kini berada dalam milikan pencelah pertama hingga kelima akibat daripada perintah Anton Piller (lihat perenggan 61–63).

(2) Pemohon tidak menggunakan permohonan dan IJM untuk mengetepikan penghakiman persetujuan untuk melindungi dirinya daripada tindakan yang diambil oleh pencelah pertama hingga kelima. Berkemungkinan besar bahawa pemohon telah memfailkan permohonan itu kerana kebimbangan utamanya bahawa tidak ada sesiapa yang menerajui melindungi kepentingan Fintree, dan bahawa dia tidak berniat untuk menyekat Guaman 623, kerana dia telah menawarkan untuk mengaku janji bahawa dia akan tidak membantah sebarang permohonan oleh pencelah pertama hingga kelima untuk meneruskan prosiding dalam Guaman 623. Pemohon tidak mungkin mengetahui tentang penghakiman persetujuan kerana ia mengandungi beberapa dakwaan serius terhadapnya yang dia tidak akan bersetuju dengan kata-kata mereka sekiranya dia mengetahui penghakiman persetujuan tersebut. Oleh itu, permohonan itu adalah bona fide dan tiada sebarang penyalahgunaan proses oleh pemohon dalam membuat permohonan. Permohonan tidak difailkan untuk tujuan kolateral dan tiada mala fide dalam mendapatkan perintah IJM dan/atau membuat permohonan (lihat perenggan 65–68).

(3) IJM tidak bertindak bersama atau memihak kepada pemohon untuk meneruskan agenda yang didakwa seperti yang dikatakan oleh pencelah pertama hingga kelima dan IJM telah bertindak secara objektif dan bebas kerana ia adalah munasabah bagi IJM untuk memfailkan permohonan untuk mengetepikan penghakiman persetujuan yang dimasukkan antara pencelah pertama hingga kelima dan Fintree, diikuti dengan saman pemula apabila mahkamah dalam Guaman 623 enggan menghentikan atau menangguhkan pemeteraian penghakiman persetujuan kerana kesan moratorium di bawah s 410(c) Akta Syarikat 2016 (lihat perenggan 69).

(4) Permohonan hendaklah diasingkan daripada pertikaian yang sedang berlangsung antara pengarah dan pemegang saham kumpulan sykt PNL kerana ia bukan faktor yang perlu diambil kira bagi tujuan ss 405 dan 406 Akta Syarikat 2016 dalam memberikan perintah pengurusan kehakiman. Isu sama ada perniagaan Fintree dikatakan menyalahi undang-undang bukan untuk diputuskan oleh mahkamah ini kerana terdapat pelbagai prosiding undang-undang lain di mahkamah lain untuk perkara yang sama ditentukan dan pada masa ini tiada penemuan perniagaan Fintree sebagai haram (lihat perenggan 70–71).

(5) Walaupun Fintree kelihatan muflis buat sementara waktu, terdapat kemungkinan besar Fintree menjangkakan untuk menerima aliran

masuk tunai yang besar daripada banyak kontrak yang sedang berjalan dan oleh itu dengan pembuatan perintah pengurusan kehakiman ('JM'), Fintree lebih berkemungkinan akan daripada tidak dapat memenuhi tujuan 'berkemungkinan mencapai satu daripada tujuan atau lebih' seperti yang diperuntukkan dalam s 405(1)(b) Akta Syarikat 2016. Fintree pada imbangan kebarangkalian akan dapat menyelesaikan hutang tertunggak yang terhutang kepada pemiutangnya dan meneruskan perniagaan jika perintah JM dibuat. Liabiliti Fintree kelihatan jauh melebihi asetnya dan Fintree tidak dapat dalam keadaan semasanya menyelesaikan hutang dan liabilitinya. Pulangan kewangan kepada pemiutang Fintree adalah lebih baik jika perintah JM dibenarkan berbanding dengan situasi penggulungan. Kemungkinan remedi alternatif dengan sendirinya bukanlah alasan untuk mahkamah menolak permohonan pengurusan kehakiman (lihat perenggan 76 & 78).]

Cases referred to

Cosmotron Electronics (Singapore) Pte Ltd, Re [1989] 2 MLJ 11, HC (refd)
MTI Trading Systems Ltd (in administration) and others, Re [1998] 2 BCLC 246 (folld)
Sin Soon Hock Sdn Bhd [2020] MLJU 1242; [2020] 1 LNS 976, HC (consd)
Spacious Glory Sdn Bhd v Coconut Three Sdn Bhd (previously known as Nexgram Land Sdn Bhd) [2022] 7 MLJ 76, HC (folld)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016)
Companies Act 2016 ss 404, 405, 405(1), (1)(b), (1)(b)(iii), 406, 410(c)
Personal Data Protection Act 2010
Rules of Court 2012 O 18 r 19(1)(b), (1)(d)

De Zhen Shim (with Hazwan Lee) (Yeoh Shim Siow & Lay Kuan) in encl 1 for the applicant.
Himahlini Ramalingam (Himahlini & Co) for the interim judicial manager.
Yap Boon Hau (with Christina Lau and Fang Kang Lun) (Mah-Kamariyah & Philip Koh) for the first, second, third, fourth and fifth interveners (PNL Group of Companies) and applicant in encl 64.
Gregory Das (with Dawn Wong) (Steven Thiru and Sudhar Partnership) for the sixth intervener (Liew Chia Soon) and applicant in encl 24.
Gopi Seshadari (Gopi Seshadari) for the seventh intervener (Venessa Kang Mooi Chin).

Nadzarin Wok Nordin JC:

[1] By way of an originating summons dated 18 January 2021 ('application'), the applicant one Loh Teck Wah (applicant) had applied to this court to place the respondent, Fintree Capital Sdn Bhd ('Fintree'), under

judicial management pursuant to s 405 of the Companies Act 2016.

[2] The first to fifth interveners have also moved this court to set aside the IJM order and dismiss the application, vide:

(a) prayer 2 of encl 64 — the first to fifth proposed interveners seek to set aside the interim judicial manager order dated 20 January 2021 pursuant to the inherent jurisdiction of this court; and

(b) prayer 3 of encl 64 — the first to fifth proposed interveners seek to strike out the application filed herein pursuant to O 18 r 19(1)(b) and/or (d) of the Rules of Court 2012 and/or inherent jurisdiction of this court.

[3] The sixth intervener has also applied to, inter alia, set aside the interim judicial manager order dated 20 January 2021 in encl 24 and the application filed herein pursuant to O 18 r 19(1)(b) and/or (d) of the Rules of Court 2012 and/or inherent jurisdiction of this court

BACKGROUND

[4] Fintree was incorporated on 14 May 2020 under the laws of Malaysia. It has one shareholder and one director, being Mr Liew Chia Soon ('Liew'), who is the sixth intervener in these proceedings. The issued and paid up capital of Fintree is RM100,000 comprising 100,000 ordinary shares.

[5] Fintree is in the business of, inter alia, providing financial consultancy services.

[6] Prior to the incorporation of Fintree, Liew was an employee who worked as a senior manager for the first to fifth interveners in charge of finance and entire operation and had resigned on 17 March 2020.

[7] Fintree employs the following employees:

(a) Beverly Ng Sze May;

(b) Stephen Ong Ching Jen;

(c) Ong Shin Joe; and

(d) Michelle Mah Siew Luan.

(collectively, 'the employees').

[8] The first to fifth interveners are companies incorporated under the Companies Act 1965 whereby:

(a) the first and second interveners provide financial and management consultancy services and investment holding;

(b) the third intervener is involved in general trading, investment holding;

(c) the fourth intervener's principal nature of business is property investment; and

(d) the fifth intervener is involved in the business of wholesaling foodstuff.

[9] The formation of the directors and shareholders of the first to fifth interveners are as follows:

(a) Dr Lim Pang Kiam (Paul), Yap Chee Kheng (Nicholas) and the applicant are directors and/or shareholders to the first to fifth interveners;

(b) Paul is a director to the first to five interveners and a shareholder of the first, second, third and fifth interveners;

(c) Nicholas is a director to the first to five interveners and a shareholder of the first, second, third and fifth interveners;

(d) the applicant is a director to the first, second, third and fourth interveners and a shareholder of the first, second, third, and fifth interveners;

(e) the third intervener is the sole shareholder of the fourth intervener;

(f) Paul and Nicholas together hold 66% of all share capital of first intervener, 64% of all share capital of second and third interveners respectively, and 88% of all share capital of fifth intervener;

(g) since the fourth intervener is wholly owned by the third intervener, Paul and Nicholas together indirectly own the majority of the share capital of the fourth intervener through the third intervener; and

(h) Paul and Nicholas constitute the two-thirds' majority of the board of directors of the first, second, third, and fourth interveners and the entire board of directors of the fifth interveners.

[10] The applicant had obtained an ex parte order on 20 January 2021 (interim JMO) to appoint Datuk Mohd Afrizan as the interim judicial manager (IJM).

[11] On 22 December 2020, a suit vide Kuala Lumpur High Court Suit No WA-22NCC-623–12 of 2020 (Suit 623) was filed by the first to fifth interveners against Fintree and Liew.

[12] Two consent judgments had thereafter been entered, one between Liew

and the first to fifth interveners, and a second one between Fintree (with Liew acting on its behalf) and the first to fifth interveners in Suit 623, which essentially admitted the allegations by the first to fifth interveners against Liew and Fintree (consent judgments).

[13] The applicant thereafter applied to set aside the two consent judgments, first by applying to intervene in Suit 623 to stop the two consent judgments from being sealed. The learned High Court judge declined to stop the sealing of the same, and suggested fresh proceedings be filed instead.

[14] The applicant therefore commenced Kuala Lumpur High Court Originating Summons No WA-24NCC-40–02 of 2021 to set aside the consent judgments. Given that Fintree had to be named a party to the suit, being a party to the consent judgments, the applicant also applied for leave from this honourable court via encl 20 to commence/continue with proceedings involving Fintree.

[15] The IJM had also commenced proceedings via Kuala Lumpur High Court Originating Summons No WA-24NCC-43–02 of 2021 to set aside the consent judgments on the grounds, inter alia, that they were obtained after the judicial management moratorium had taken effect.

[16] Presently, there are several ongoing legal proceedings between the parties which have yet to be fully heard and determined, including:

(a) Kuala Lumpur High Court Originating Summons No WA-24NCC-40–02 of 2021 commenced by the applicant to set aside the two consent judgments;

(b) Kuala Lumpur High Court Originating Summons No WA-24NCC-43–02 of 2021 commenced by the IJM to set aside the two consent judgments;

(c) Kuala Lumpur High Court Originating Summons No WA-24NCC-119–09 of 2021 commenced by the applicant against Lim Pang Kiam, Yap Chee Kheng, PNL Trading Sdn Bhd and Subang Industry Park Sdn Bhd;

(d) Kuala Lumpur High Court Originating Summons No WA-24NCC-121–03 of 2021 commenced by the applicant against Lim Pang Kiam, Yap Chee Kheng and PNL Capital Sdn Bhd; and

(e) Kuala Lumpur High Court Suit No WA-22NCC-142–03 of 2021 commenced by the first to fifth proposed interveners against the applicant, Fintree's employees, Wawa Trading Sdn Bhd, W Capital Sdn Bhd and Pinnacle Valley Sdn Bhd.

APPLICANT'S SUBMISSIONS

[17] It was submitted by the applicant that he was part of a quasi-partnership with two other persons, Paul and Nicholas in the PNL Group of companies ('PNL Group') which includes the first to fifth interveners as follows:

Companies	Directors	Shareholders
PNL Capital Sdn Bhd (first plaintiff in Suit 623)	1. Yap Chee Kheng 2. Lim Pang Kiam 3. Loh Teck Wah	1. Yap Chee Kheng 2. Lim Pang Kiam 3. Loh Teck Wah
PNL Business Services Sdn Bhd (second plaintiff in Suit 623)	1. Yap Chee Kheng 2. Lim Pang Kiam 3. Loh Teck Wah	1. Yap Chee Kheng 2. Lim Pang Kiam 3. Loh Teck Wah 4. Lee San Koon
PNL Trading Sdn Bhd (third plaintiff in Suit 623)	1. Yap Chee Kheng 2. Lim Pang Kiam 3. Loh Teck Wah	1. Yap Chee Kheng 2. Lim Pang Kiam 3. Loh Teck Wah 4. Lee San Koon
Subang Industry Park Sdn Bhd (fourth plaintiff in Suit 623)	1. Yap Chee Kheng 2. Lim Pang Kiam 3. Loh Teck Wah	PNL Trading Sdn Bhd
Tian An Trading Sdn Bhd (fifth plaintiff in Suit 623)	1. Yap Chee Kheng 2. Lim Pang Kiam 3. Loh Teck Wah (not re-elected as a director on 17 June 2020)	1. Yap Chee Kheng 2. Lim Pang Kiam 3. Loh Teck Wah

[18] In terms of shareholding, the applicant, Paul and Nicholas holds equal shares in the first to third interveners.

[19] The applicant submits that in early 2020, there were negotiations between the applicant, Paul and Nicholas to go their separate ways in the various businesses in which they are directors and shareholders. The negotiations concerned the companies in the table set out below:

No	Company
	Group 1
1	PNL Business Services Sdn Bhd
2	PNL Land Sdn Bhd
3	PNL Trading Sdn Bhd
4	Subang Industry Park Sdn Bhd
5	PNL Venture Sdn Bhd

6	Nanyang Vision Sdn Bhd
	Group 2
7	PNL Secretarial Sdn Bhd
8	Westfield Ventures Sdn Bhd
9	Midas Parade Sdn Bhd
10	Rimbun Sentral Sdn Bhd
11	Antara Hijau Sdn Bhd
	Group 3
12	PNL Capital Sdn Bhd
13	Natural Ideas Sdn Bhd
14	Era Pelita Sdn Bhd
15	Urban Fiesta Sdn Bhd
16	Scenic Summit Sdn Bhd
17	Rising Salute Sdn Bhd
	Tian An Group
18	Tian An Trading Sdn Bhd
19	Succeo Brand Holdings Sdn Bhd
20	Warna Kencana Sdn Bhd

[20] It is the applicant's case that Fintree was set up following the cessation of the fundraising and investment division of the PNL Group:

(a) on 21 February 2020, Nicholas had informed the applicant that the PNL Group would no longer be doing any more bank loans and new investments, and that the then employees Beverly Ng Sze May and Michelle Mah Siew Luan would be terminated;

(b) in a series of emails between Paul, Nicholas and the applicant in early 2020, there was also discussion of a dissolution of the partnership. In an email dated 6 March 2020, the applicant had informed Paul and Nicholas that he intended to set up his own company to continue to earning his livelihood; and

(c) on 9 March 2020, the applicant had sent an email to Paul and Nicholas setting out their latest discussion on an amicable resolution of the dissolution of their partnership.

[21] The first to fifth interveners, represented by Paul, have adduced documents showing the breakdown in relationship between Paul and Nicholas on one hand, and the applicant on the other, alleging that it was the applicant who was at fault and had abandoned the PNL Group.

[22] It is contended by the applicant that:

(a) it was against this backdrop that Fintree was incorporated wherein Liew was asked to lead the business of Fintree due to his position as senior manager in the PNL Group where he was heavily involved in the fundraising and investment division, and oversaw the accounts of the PNL Group;

(b) following the cessation of the fundraising and investment division of the PNL Group, there was no more need for Liew and the relevant staff members to remain with the PNL Group. It was therefore natural for them to want to leave the PNL Group, and thereafter join Fintree;

(c) the employees and Liew were not forced to resign from the PNL Group but did so willingly — there is no evidence of coercion;

(d) he personally financed the setting up of Fintree through monetary advancements to both Liew and Fintree, including the following:

(i) RM100,000 to Liew to pay up the share capital of Fintree;

(ii) monies for the purpose of paying Fintree's rental deposit, office equipment, computers, initial staff salaries and working capital; and

(iii) RM300,000 to Fintree as working capital.

[23] The applicant further submits that Liew has admitted that such sums were indeed advanced by the applicant to himself and Fintree.

[24] The applicant then contends that:

(a) on 12 January 2021, the applicant was informed by Liew that the first to fifth interveners had taken out an Anton Piller order on an ex parte basis against Liew and Fintree via Suit 623;

(b) while the applicant remained a director and shareholder of the first to fifth interveners, he was not informed of the Suit 623 and no notice of the same was given to him;

(c) the remedies sought in Suit 623 and the Anton Piller order were extensive and extremely prejudicial to the business of Fintree, having the real risk of killing off Fintree's business; and

(d) both the applicant and Liew swore affidavits to postpone and oppose the Anton Piller order.

[25] It is submitted by the applicant that Liew however subsequently exhibited a change in behaviour:

(a) on 14 January 2021, Liew had without explanation decided to remove his solicitors and appoint a new firm of solicitors;

(b) he agreed to the Anton Piller order without seeking to vary the Anton Piller order or to protect Fintree's interest and without any explanation to the applicant. This placed Fintree's clients' information at risk and exposed Fintree to significant claims of breach of confidentiality, and contravention of the Personal Data Protection Act 2010;

(c) he had expressed that he was tired and wanted to 'go away'; and

(d) the employees of Fintree were left hanging without certainty.

[26] The applicant further contends that given the damaging effects of the Anton Piller order and change in Liew's behaviour who seemingly abandoned Fintree, the applicant commenced these proceedings and filed the application in his capacity as a creditor of Fintree. He also filed encl 9 to appoint an interim judicial manager ('IJM') over Fintree on an ex parte basis and via encl 2, the applicant disclosed the fact that there was a shareholders' dispute in amongst the members of the PNL Group, and disclosed the existence of Suit 623.

[27] The applicant's main concern was that there was no one at the helm protecting the interests of Fintree, and that he did not intend to stifle Suit 623, as seen by the fact that he had offered to undertake that he would not object to any application by the first to fifth interveners to continue the proceedings in Suit 623.

[28] On 20 January 2021, an order was granted appointing the IJM over Fintree, and the applicant avers that it was shortly after that the applicant discovered the consent judgments and that the consent judgments contained very serious allegations against the applicant, accusing him of orchestrating a grand scheme to cause the near collapse of the businesses of the first to fifth interveners.

[29] The applicant further submits that he was fully unaware of the attempts by Liew to negotiate with the first to fifth interveners into entering into consent judgments which was never disclosed to him and that he would not have agreed to the accusations against him as set out in the consent judgments.

[30] It is submitted by the applicant that:

(a) the application herein should be separated from the ongoing dispute between directors and shareholders of the PNL Group and the same should not be given much weight for the purposes of the application as they do not factor into the tests set out in ss 405 and 406 of the Companies Act 2016 for granting a judicial management order;

(b) Liew has deposed to retained profits of RM68,288.87 in his affidavit dated 18 March 2021 (encl 71) via a purported balance sheet as at January 2021 and claims that Fintree is a going concern, but this figure is unverifiable due the confiscation of Fintree's accounting books and documents;

(c) Liew's conduct in response to an inquiry by the IJM, Liew had earlier stated that all documents and records of Fintree had been handed over the first to fifth interveners and that he has since changed his narrative, deposing that he was able to access the balance sheet because it was not a document seized, in addition to his contradictory testimonies in the affidavit he has filed in Suit 623 and the ones filed in these proceedings, should be considered in determining whether his evidence is credible; and

(d) the first to fifth interveners claim that Fintree is a going concern is simply untenable, in addition to having failed to adduce any evidence whatsoever that Fintree is a going concern.

[31] The applicant also submits that Liew, as the sole director and shareholder of Fintree, has proven to be incapable of managing Fintree or ensuring the interests of its creditors are protected:

(a) he has failed to propose any steps to see to the continuity of Fintree;

(b) he has instead placed Fintree's survival in jeopardy by agreeing to the Anton Piller order and entering into consent judgments under which Fintree has wrongly consented to being liable for the considerable sum of RM695,206 despite having solid grounds of defence, and under which Fintree has been rendered unable to operate;

(c) he has expressly refused to cooperate with the IJM whose task is to preserve the status quo so that Fintree may be rehabilitated; and

(d) he has also gone so far as to allege that the employees of Fintree are working at the behest of the applicant and that it is unlikely any working relationship between Liew and the employees can be preserved. In this respect, Liew has failed to explain how he plans to continue running Fintree without the employees.

[32] In contrast, the applicant contends that as a creditor, he has done far more for Fintree, including:

(a) paying the salaries of the employees and the utilities for January, February and March 2021;

(b) providing an undertaking to continue funding the salaries, rent and utilities of Fintree in the coming months, and commiting to fund the purchase of computers and new equipment for Fintree to continue serving its customers; and

(c) offering to buy out the business in Fintree so that the contracts with clients and the business of Fintree can be continued.

[33] The applicants thus submit that the proposal for Fintree's rehabilitation is straightforward:

(a) for Fintree to trade itself out of its predicament with the support of its creditors, in particular Vanessa Kang who will procure new contracts;

(b) for the applicant to finance the expenses and operations of Fintree in order for it to be capable of carrying out its operations; and

(c) in view of Liew's conduct which is contrary to the interests of Fintree and its creditors as a whole, to sell off Fintree's business to someone who is capable of managing and financing its business.

First to fifth interveners submissions

[34] The first to fifth interveners submit, inter alia, that:

(a) there has been non-disclosure on the applicant's and/or the IJM 's part in obtaining the IJM order;

(b) the applicant has misled the court to think that Fintree is insolvent and that he is a creditor of Fintree;

(c) the applicant was abusing the court process under the disguise of alleged attempt to rehabilitate Fintree and alleged breach of confidentiality duty owed by Fintree towards clients;

(d) the applicant had contrived a plan to steal, transfer, delete and conceal and use the corporate information and opportunity he procured from amongst others the first and second interveners;

(e) Fintree is a vehicle incorporated by the applicant as his proxy to avoid detection in execution of his fraudulent plan and to conduct competing business with amongst others the first and second interveners; and

(f) when the consent judgments was obtained, the applicant manipulated the filing of the application herein and the appointment of the IJM as a tactical manoeuvre to stifle the consent judgments due to his fear of being held liable or subject to claims from the first and fifth interveners based on the information obtained from the raid.

[35] It is further submitted by the first to fifth interveners that all the staff who worked for the first and second interveners reported directly to the applicant, who was the managing director of the first and second interveners from 2016 to 2019, as their direct superior during their respective terms of employment and that they have since left the employment of the first and second interveners.

[36] The first to fifth interveners contend that Venessa Kang Mooi Chin (the seventh intervener) was introduced by the applicant to Nicholas and Paul late year 2016, and they were was made to understand by the applicant that Vanessa works as a manager, business development department and subsequently, director of the business development department for the first and second interveners whereby she will bring in businesses for the companies. In return, Vanessa will get a cut of 50% from the gross fee paid by customers.

[37] In this respect the first to fifth interveners submit that:

(a) there is no appointment letter issued to Venessa in the records of the first and second interveners and Venessa has failed to provide any to the effect;

(b) Venessa is at best a marketing agent for the first and second interveners; and

(c) it is also notable that Venessa has failed to provide any appointment letter issued by Fintree.

[38] The first to fifth interveners state that upon Liew's resignation and before his departure on 17 April 2020, he surrendered the company laptops possessed by him during his employment ('company laptops') to Ms May Lee San Koon, the human resources manager of the first to fifth interveners ('Ms May'):

(a) as Liew surrendered the company laptops, he informed Ms May that all the data and information contained in the company laptops had been deleted and repeatedly advised her to re-format the company laptops, should the said laptops be assigned to another staff; and

(b) it is Nicholas and Paul's evidence that they were informed by Ms May on the aforesaid and such behaviour and anxiety on Liew's part raised suspicion to them.

[39] It is then submitted by the first to fifth interveners that Nicholas and Paul then appointed an IT forensic investigation firm, LE Global Services Sdn Bhd ('LGMS') to conduct a forensic check on the company laptops and that the result of the forensic check revealed that the following illegal acts were committed by Liew:

(a) most of and/or all of the files, records, spreadsheets, reports, documents, data and information were downloaded into the company laptops from the office server of the first to fifth interveners;

(b) the said files, data and information belonging to the first to fifth interveners were then uploaded to the personal cloud storage of Liew; and

(c) usage of erasing tools and applications to conceal the said actions were traced on the company laptops.

[40] The first to fifth interveners further contend that subsequently, the following events were also discovered:

(a) Liew had incorporated Fintree in the capacity as its sole director and shareholder;

(b) Liew had visited the premises of the first to fifth proposed interveners on various occasions without the knowledge of Nicholas and Paul between the period of February 2020 and April 2020 when the country was under Movement Control Order; and

(c) at the same time, the staff who used to work for the first and second interveners have joined Fintree.

[41] In light of the above, the first to fifth interveners submit that:

(a) they commenced Suit 623 action against Liew and Fintree in the Kuala Lumpur High Court wherein;

(b) subsequently, the first to fifth interveners applied for an Anton Piller order which was granted in terms by the court on 7 January 2021. The order was further later amended on 8 January 2021;

(c) the raid at the premises of Liew and Fintree took place on 13 February 2021 and 14 February 2021, it was discovered, inter alia that:

(i) the applicant arranged through Liew for key staff of the first to fifth interveners to systematically resign from the first to fifth interveners;

(ii) the applicant and/or Liew transferred the clientele of the first to fifth proposed interveners to Fintree;

(iii) the applicant and/or Liew utilised Fintree to start a competing business with the first and second proposed interveners; and

(iv) the applicant and/or Liew instructed the impugned staff to liaise with clients through WhatsApp and to transfer all records made through the email of the first to fifth interveners to private emails and delete such record in the first to fifth interveners' server to avoid detection;

(d) payment vouchers, accounting ledgers, sale and purchase agreements and other documents belonging to the first to fifth interveners were found in the premise of Fintree;

(e) the applicant instructed the impugned staff to clear, remove and/or clean up their computers before their resignation so that the record of transferring out data, accounts, ledgers, customer information, assignment, business leads and all other information from the first to fifth interveners will not surface/be traced/discovered/realised/obtained; and

(f) the applicant and/or Liew had instructed and conspired with the impugned staff to transfer the data, record and information of the first to fifth proposed interveners via private emails and to delete the trail to prevent detection from the officer of the first to fifth proposed interveners.

[42] It is then contended by the first to fifth interveners that upon the above evidence available to the first to fifth interveners, there was no choice but for Liew and Fintree to concede to their wrongdoings, in which the consent judgments were entered between the first to fifth proposed interveners, Liew and Fintree respectively on 19 January 2021.

[43] The first to fifth interveners submit that the applicant has knowledge of Suit 623 at all material times.

[44] It is also alleged by the first to fifth interveners that right upon the appointment of the IJM on 20 January 2021, the IJM instructed his solicitors, Messrs Himahlini & Loh ('IJM's Solicitors') to issue a letter to the High Court in Suit 623, requesting for the consent judgments not to be sealed in light of his appointment as the IJM of Fintree and that the said letter was forwarded via an email to the first to fifth proposed interveners' previous solicitors, Messrs Iza Ng Yeoh & Kit ('the previous solicitors') but it was not stated where and how did the IJM gain immediate knowledge of Suit 623 and the consent judgments.

[45] It is further submitted by the first to fifth interveners that:

(a) the applicant had on 26 January 2021 applied to, inter alia, intervene into Suit 623 and set aside the consent judgments entered into between parties and that the IJM had on the same day applied to the court to, inter alia, set aside the consent judgment entered between the first to fifth proposed interveners and Fintree;

(b) on 27 January 2021, the High Court in Suit 623 had declined to set aside the consent judgments on the ground that the sealing of the judgments is purely an administrative function;

(c) the applicant and the IJM had on 2 February 2021 and 3 February 2021 respectively filed and served their respective Kuala Lumpur High Court Originating Summons No WA-24NCC-40–02 of 2021 dated 2 February 2021 ('OS 40') and Originating Summons No WA-24NCC-43–02 of 2021 dated 3 February 2021 ('OS 43') to set aside the consent judgments;

(d) the coordinated actions of the applicant and the IJM is aimed at thwarting and stifling the consent judgment; and

(e) the first to fifth interveners have filed a suit inter alia against the applicant in the Kuala Lumpur High Court Suit No WA-22NCC-142–03 of 2021 ('Suit 142').

[46] It is also submitted by the first to fifth interveners that the attempt to show that Fintree is or will be unable to pay its debts is misconceived for the following reasons:

(a) no real threat of winding up received by Fintree or reported to the IJM;

(b) the applicant has exhibited an outdated financial statement and it is insufficient to prove that Fintree is unable to pay its debts; and

(c) Liew has confirmed that Fintree is a going concern with a net profit of RM68,288.87 as at in or around January 2021.

Sixth interveners submissions

[47] Liew Chia Soon ('Liew') (the sixth intervener in these proceedings) opposes the application which seeks to place the respondent under judicial management and submits inter alia that an order of judicial management is not warranted for the following reasons:

(a) there is an alternative remedy to the applicant's complaints;

(b) there is no evidence of the Fintree's insolvency or its inability to pay its debts;

(c) Fintree is, in any event, a going concern;

(d) the proposed judicial management is devoid of the approval of a majority of Fintree's creditors;

(e) the proposed judicial management does not result in a more advantageous realisation of the Fintree's assets compared to an order of winding up; and

(f) these judicial management proceedings have been filed in abuse of process and for collateral purposes.

Venessa Kang (seventh intervener's) submissions

[48] Venessa Kang submits that:

(a) as Fintree was a new start up, Liew had asked her to delay making claims on the commission due to the her although the first successful cases where invoices could be rendered by Fintree to clients occurred in or around November and December 2020, and that she had acceded to Liew's request as the respondent was under financial pressure being a new start-up to settle staff salaries and other payments; and

(b) 100% of the Fintree's clients from the time of its inception are persons/companies that have been referred by the intervener and her team to Fintree. The commissions due to the her by Fintree (which includes contingent claims) is approximately RM2,945,118.53 to-date and she is thus the single largest unsecured creditor of Fintree.

Interim judicial manager's preliminary reports

[49] The IJM has prepared two preliminary reports regarding the status of the interim judicial management:

(a) preliminary report dated 23 February 2021 at exh IJM17 of encl 59 ('first IJM report'); and

(b) second preliminary report dated 29 March 2021 at exh IJM31 of encl 77 ('second IJM report').

First IJM report

[50] In the first IJM report, the IJM reported the challenges and difficulties encountered in assessing whether Fintree could be continued due to:

(a) the Anton Piller order which led to the computers, devices, information and documents of Fintree (including the accounting system in the server, the accounting records, clients' documents, documents regarding human resources, and contracts executed by Fintree) being confiscated;

(b) the consent judgments which resulted in the first to fifth proposed interveners gaining a blanket permanent control over the items and documents seized under the Anton Piller order; and

(c) the consent judgments which also caused the entire operating capability of Fintree to come to a standstill.

[51] Consequently, the IJM would not be able to ascertain the prospect of Fintree's survival in a short period of time until all properties of Fintree have been returned.

[52] The IJM also reported that:

(a) he is unable to ascertain what documents have been seized following the Anton Piller order due to the supervising solicitors' failure to list down a copy of all the documents seized from Fintree's premises;

(b) he is caught in a dilemma whereby he is not able to hand over third party documents and risk allowing these documents to be used by third parties, which may lead to a breach of confidentiality in the contracts between Fintree and its clients;

(c) he will be taking steps to reconstruct the documents of Fintree by reaching out to known clients of Fintree; and

(d) Liew's actions demonstrate that he does not wish to continue with the business of Fintree.

[53] The IJM concluded that there was an urgent need to compel the return of the records, documents and computers and devices of Fintree, without which the survival of Fintree would be in jeopardy.

Second IJM report

[54] In the second IJM report, the IJM identified various clients of Fintree.

[55] The IJM has as of the date of the second IJM report received replies from four customers confirming that they were never a client of the first to fifth proposed interveners and that they are willing to continue with the contracts executed with Fintree, subject to further discussion with the IJM on the timelines for the delivery of the works.

[56] One client, Arcadia Energy Sdn Bhd, had via a letter dated 19 March 2021 terminated its appointment of Fintree and sought a refund of the RM12,000 which was deposited with Fintree. The IJM is presently working with the employees to persuade this client to continue with the contract.

[57] The IJM has since executed three letters of appointment with new customers, and estimates that the revenue that may be generated from existing continuing customers and from the new potential business to be in the region of RM2.4m over the next six months.

[58] According to the second IJM report:

(a) without the records of Fintree due to their seizure following the Anton Piller order, the IJM is unable to prepare the necessary statutory forms

and make the contributions (EPF, SOCSO and EIS) for the employees, as well as their PCB income tax deductions;

(b) Fintree has a sum of RM188,240.49 cash at bank according to the bank statements of two of Fintree's banks, Malayan Banking Bhd (as at 31 December 2020) and CIMB Bank Bhd (as at 28 February 2021);

(c) the total sum of creditors (subject to further verification by the IJM) is RM4,870,913.29;

(d) the estimated assets and liabilities of Fintree as at the date of the second IJM report are as follows:

(e)

Assets	
Fixed Assets	RM0
Cash in Hand	RM187,000
Receivables	RM2,400,000
Total	RM2,587,000
Liabilities	
Advance by Loh Teck Wah	RM120,000
Creditors Post IJM	RM1,200,000
Creditors Pre IJM	RM3,569,298.29
Total	RM4,889,298.29
Net	(RM2,302,298.29)

(f) Fintree is at this juncture unable to pay off its debts as they fall due. Based on Fintree's present bank balance as at the date of the second IJM report, the recovery by creditors would only be RM0.039 for every RM1;

(g) however, if Fintree is allowed to continue operating and working on the existing and new contracts, recovery after six months is estimated to be RM0.38 for every RM1;

(h) while Liew has deposed to retained profits of RM68,288.87 in his affidavit dated 18 March 2021 (encl 71), the IJM is unable to verify this figure based on the documents. The IJM also notes that Liew had earlier stated that all documents and records of Fintree had been handed over the first to fifth proposed interveners;

(i) the applicant had on behalf of Fintree paid the salaries of the employees and the utilities for January, February and March 2021;

(j) the applicant has also provided an undertaking to continue funding the salaries, rent and utilities of Fintree in the coming months, and is committed to fund the purchase of computers and new equipment for Fintree to continue serving its customers;

(k) the IJM has received separate written requests from the applicant and Venessa (Kang Mooi Chin) to buy out the business of Fintree. They are confident that the business of Fintree can be continued with the current employees with the exception of Liew, and that the contracts with clients can be fulfilled; and

(l) with the continued support of Loh Teck Wah and Vanessa Kang, Fintree will very likely be able to complete the ongoing works and generate the estimated revenue so that its creditors would stand to gain more recovery for their debts.

FINDINGS OF THE COURT

Applicant as creditor

[59] This court will firstly address the issue of the applicant as a creditor of Fintree pursuant to s 405(1) of the Companies Act 2016 as the same provides that any member or the board of directors, or a creditor, including any contingent or prospective creditor or all or any of those parties, together or separately, may make an application under s 404 as the said s 405 reads:

> (1) Where a company or its directors, under a resolution of its members or the board of directors, or a creditor, including any contingent or prospective creditor or all or any of those parties, together or separately, makes an application under section 404, the court may make a judicial management order in relation to the company ...

[60] In coming to my finding on whether the applicant is a creditor, I have applied this court's decision in *Spacious Glory Sdn Bhd v Coconut Three Sdn Bhd (previously known as Nexgram Land Sdn Bhd)* [2022] 7 MLJ 76 where this court stated:

> *... that the term 'creditor' in* s 405 of the Companies Act 2016 must include all persons having any pecuniary claims against the respondent.

[61] Based on *Spacious Glory* I find that the applicant has the locus standi to commence the application as he has on a balance of probabilities proven that he is a creditor of Fintree, due to the following:

(a) the sum of RM100,000 by the applicant to Liew for the paid up share capital of Fintree;

(b) monies provided by the applicant for the purpose of paying Fintree's rental deposit, office equipment, computers, initial staff salaries and working capital;

(c) the sum of RM300,000 from the applicant to Fintree as working capital;

(d) Liew admitting that such sums were indeed advanced by the applicant to himself for the purpose of being used towards the rental deposit, office equipment, computers, initial staff salaries and working capital as well as the paid up capital of Fintree as stated in Liew's affidavit in encl 25 at para 48.3; and

(e) the applicant is not a contributory of Fintree as no shares have been distributed to him and the amounts paid by him have not been capitalised.

[62] Due to my above finding, I therefore hold that the first to fifth interveners contention that the sum of RM200,000 was advanced by the applicant to Liew, which makes him a creditor to Liew and not to Fintree as being untenable.

[63] I also hold the fact that the applicant has not produced any statement of account or balance sheet as evidence that he is recorded as a 'creditor' as unacceptable due to the documents of Fintree now being in the possession of the first to fifth interveners as a result of the Anton Piller order.

Bona fides

[64] As to the bona fides of the applicant in making the application, this court finds that the applicant had filed an affidavit on behalf of the defendants in Suit 623 ie Liew and Fintree, on 13 January 2021 to oppose the Anton Piller order as can be seen in exh PL15 of encl 66, the applicant's affidavit of the same. This evidence at para 4 of the said applicant's affidavit in exh PL15 of encl 66, corroborates the averment by the applicant that he only had knowledge of Suit 623 on 12 January 2021 where the applicant avers in the said affidavit that he was informed by Liew that the first to fifth interveners had taken out an Anton Piller order on an ex parte basis against Liew and Fintree via Suit 623.

[65] After reading the affidavit in support of the application and from my assessment of the facts, documents and issues before this court I am not in agreement with the first to fifth intervener that the applicant had intended to use the application and the IJM to set aside the consent judgment to protect himself from actions being taken by the first to fifth interveners and I find support in this due to the fact that the applicant has via his affidavit in support in encl 2, disclosed the fact that there was a shareholders' dispute in amongst the members of the PNL Group, and disclosed the existence of Suit 623.

[66] It is also my considered view that it is highly probable that the applicant had, as claimed by him, filed the application due to his main concern that there was no one at the helm protecting the interests of Fintree, and that he did not

intend to stifle Suit 623, as seen by the fact that he had offered to undertake that he would not object to any application by the first to fifth interveners to continue the proceedings in Suit 623.

[67] I am also of the view that the applicant could not have been aware of the consent judgments as the same contained some serious allegations against him which he would not have consented to their wording had he known of the said consent judgment. It is also my decision herein that the issues raised in the other legal suits between the parties are not to be decided in this court but are matters which concern and should be rightly be decided in the other courts.

[68] I therefore hold that the application is bona fide and that there has been no abuse of process by the applicant in making the application. I further hold that the application was therefore, based on my findings on the facts above mentioned, not filed for collateral purposes and that there was no mala fides in obtaining the IJM order and/or making the application herein.

Conduct of IJM

[69] I also find from the evidence before me that the IJM has not been acting in concert with or in favour of the applicant to pursue his alleged agenda as contended to by the first to fifth respondent and that the IJM has acted objectively and independently as it is perfectly reasonable for the IJM to file an application to set aside the consent judgment entered between the first to fifth interveners and Fintree, followed by an originating summons (OS 43) when the court in Suit 623 refused to stop or delay sealing of the consent judgments due to the moratorium effect under s 410(c) of the Companies Act 2016 which provides:

> During the period beginning with the making of an application for a judicial management order and ending with the making of such an order or the dismissal of the application:
>
> (a) ...
>
> (b) ...; and
>
> (c) no other proceedings and no execution or other legal process shall be commenced or continued and no distress may be levied against the company or its property except with leave of the Court and subject to such terms as the Court may impose.

Separation of JM application from other legal proceedings

[70] I agree with the applicant's counsel that the application herein should be separated from the ongoing dispute between directors and shareholders of the PNL Group for the purposes of encl 1 as they are not factors to be taken into

consideration for the purposes of ss 405 and 406 of the Companies Act 2016 in granting a judicial management order. Permit me to adopt and refer to *Re MTI Trading Systems Ltd (in administration) and others* [1998] 2 BCLC 246 where Carnwath J stated:

> that the conflicts of orders in different courts and jurisdictions should be ended if at all possible. The best chance of doing that is by securing that, in at least this jurisdiction, the companies are in the hands of persons independent from the warring factions and under the control of the court.

[71] I am also of the view that the issue of whether Fintree's business is to be said to be illegal is not for this court to decide as there are various other legal proceedings in the other courts for the same to be determined and that there is at present no finding of Fintree's business as being illegal.

Factors for the JM application

[72] Accordingly, from the facts before me I find that:

(a) Liew was an ex-employee of PNL Capital Sdn Bhd and that his last position was as a senior manager and he had resigned via letter dated 16 March 2020 as seen in exhs PL 2 and PL 3 of the affidavit in support filed by Lim Pang Kiam (also known as Paul Lim) on behalf of the first to fifth interveners in encl 66;

(b) Fintree was incorporated on 14 May 2020 and Liew is a director and shareholder of the same;

(c) Liew has in para 19.2 of his affidavit in reply (2) at encl 71, averred that Fintree is a going concern with a net profit of RM68,288.87 as at in or around January 2021, and that this is allegedly supported by Fintree's balance sheet in exh LCS1 of encl 71, which however does not appear to be an audited statement and is therefore unverified;

(d) Liew has averred at para 32.2 of his affidavit in reply (2) at encl 71 that Fintree has issued multiple invoices in December 2020 and January 2021 and the supporting documents are in the custody of the IJM; and

(e) Venessa Kang has made a claim for commission in the sum of RM2,945,118.53 against Fintree.

[73] I have also examined the second IJM report dated 29 March 2021 and note that at exh LTW31 of encl 77 under the heading 'Financial Position of the Company', the JM has stated that:

(a) the estimated assets and liabilities of Fintree as at the date of the second IJM report are as follows:

Assets	
Fixed Assets	RM0
Cash in Hand	RM187,000
Receivables	RM2,400,000
Total	RM2,587,000
Liabilities	
Advance by Loh Teck Wah	RM120,000
Creditors Post IJM	RM1,200,000
Creditors Pre IJM	RM3,569,298.29
Total	RM4,889,298.29
Net	(RM2,302,298.29)

(b) based on Fintree's present bank balance as at the date of the second IJM report, the recovery by creditors at present would only be RM0.039 for every RM1 as stated at para 3(q) of the second IJM report at exh LTW31 of encl 77;

(c) the IJM has expressed the view that the business of Fintree should be continued in order to keep it as a going concern; and

(d) currently the recovery by creditors would only be RM0.039 for every RM1 but if Fintree is allowed to continue operating and working on the existing and new contracts, recovery after six months is estimated to be RM0.38 for every RM1.

[74] This court has also considered that:

(a) the IJM has already reached out to the clients and conducted a proof of debt exercise;

(b) a total of four customers have confirmed that they are willing to continue with the contracts executed with Fintree, subject to further discussion with the IJM on the timelines for the delivery of the works;

(c) both the applicant and Venessa Kang have indicated their support for the application, and given their support to assist in the continuation of Fintree's business;

(d) the only parties who have so far indicated that they are opposing application are Liew and the first to fifth interveners, who collectively appear to hold less than 25% of the total debts of Fintree (RM759,306 out of RM4,870,913.29 =*15.59%*);

(e) Liew has confirmed in his affidavit that he has presently no active plans to continue the business of Fintree as per parah 19.4 of his affidavit in encl 71; and

(f) the business and operation of Fintree has come to a halt in light of the consent judgments.

[75] This court was referred to by counsels opposing the application to the case of *Sin Soon Hock Sdn Bhd* [2020] MLJU 1242; [2020] 1 LNS 976 where an application for judicial management was dismissed for want of evidence of the alleged insolvency of the company. It must be noted that the learned JC, Wong Hock Chong had in the said case also stated at para [25] 'I am mindful that the *quality and quantity of evidence one can expect from the applicant and nominated judicial manager will vary from case to case and from circumstance to circumstance'.* (Emphasis added). It would also depend on whom the applicant is. For instance, more will be expected where the applicant is the company itself than if it were a creditor, whose access to information will be comparatively limited.'

[76] Thus, based on all of the above findings and after considering *Sin Soon Hock Sdn Bhd*, this court holds that the evidence before this court shows:

(a) although Fintree appears to be temporarily insolvent, the evidence before this court does show that there is a strong possibility of Fintree expecting to receive a substantial cash inflow from the many ongoing contracts procured by Vanessa Kang and I therefore hold that with the making of the JM order, Fintree would more probably than not be able fulfil the purpose of 'likely to achieve one or more of the purposes' as provided for in s 405(1)(b) of the Companies Act 2016 which reads:

> (1) Where a company or its directors, under a resolution of its members or the board of directors, or a creditor, including any contingent or prospective creditor or all or any of those parties, together or separately, makes an application under section 404, the Court may make a judicial management order in relation to the company if:
>
> (a) ...
>
> (b) the Court considers that the making of the order would be likely to achieve one or more of the following purposes:
>
> (i) the survival of the company, or the whole or part of its undertaking as a going concern;
>
> (ii) the approval under section 366 of a compromise or arrangement between the company and any such persons as are mentioned in that section;
>
> (iii) a more advantageous realisation of the company's assets would be effected than on a winding up.

(b) the argument that there is no evidence to suggest that Liew, if he assumes control of Fintree would be able to continue with the contracts

abovementioned does not hold water as Liew has already indicated that there he has no plans to continue with the business of Fintree and that there is a very strong possibility that the said customers or potential customers, who have largely or almost all which have been introduced by Vanessa Kang, will remain if Vanessa is no longer involved;

(c) Fintree would on a balance of probabilities be able to settle the outstanding debt owed to its creditors and continue as a going concern if a JM order was made;

(d) Fintree is currently in a position where it would incur loss and damage by reason of not being able to engage in its business activities which Fintree's clients have appointed them to do, and that this situation would be able to be corrected if a JM order is made which in my view will then amount to a 'more advantageous' realisation of Fintree's assets than on a winding up as required under s 405(1)(b)(iii) of the Companies Act 2016;

(e) the liabilities of Fintree appear to far exceed its assets and that from the evidence before me, Fintree cannot in its current state settle its debts and liabilities;

(f) the financial return to Fintree's creditors would be better if the JM order is allowed as compared to a winding up situation;

(g) a careful reading of the IJM reports do not show that the IJM has exhibited biasness against either Liew or his solicitors as claimed by the first to fifth interveners; and

(h) the reliance by the applicant on estimates of assets & liabilities and the reference to the IJM reports was due to the fact that Fintree's documents were no longer with Fintree due to the Anton Piller order, and therefore it was on a balance of probabilities not only understandable that this could not be completely verified by the IJM but that the same would in the circumstances be acceptable by this court to be considered with the proper weight and considerations to be given thereto.

[77] In deciding the term 'likely' in s 405(1)(b) of the Companies Act 2016, this court had in *Spacious Glory Sdn Bhd v Coconut Three Sdn Bhd (previously known as Nexgram Land Sdn Bhd)* [2022] 7 MLJ 76 held that:

> The term 'likely' has not been defined in the Companies Act 2016 but the term 'likely' has been held in the UK in the case of *AA Mutual International Insurance Co Ltd Re* [2004] EWHC 2430 (Ch) to mean the applicant to demonstrate on a balance of probabilities that it is 'more probable than not' that this criterion will be fulfilled.

[78] This court had also considered counsel for the sixth intervener's submission that the law holds that a judicial management application would fail where there is an alternative remedy to the alleged grievance of the applicant and where learned counsel had cited the cases of *Spacious Glory and Re Cosmotron Electronics (Singapore) Pte Ltd* [1989] 2 MLJ 11 in support thereto. With respect, it is my view that the possibility of an alternative remedy is by itself not a ground for the court to dismiss a judicial management application. Much would depend on the facts of the case and more importantly whether the purposes stated in ss 404 and/or 405 of the Companies Act 2016 have been fulfilled. In *Spacious Glory* the fact that an alternative remedy was available was only one of the considerations by this court in not granting the judicial management order therein. The main fact in that case for not granting the order was due to the fact that there was no evidence placed before the court by the applicant therein to support any of the purposes referred to in s 405(1)(b) of the Companies Act 2016 and thus there was no real prospect or possibility to achieve one or more of the purposes set out in the said section.

[79] In any event, based on the unique facts of the case before me, I do hold that the argument of an alternative remedy is not applicable before me.

[80] I have in my decision herein also considered that the first to sixth interveners have raised allegations that Afrizan is unfit on the grounds that he and his audit firm have been sanctioned by the Audit Oversight Board of the Securities Commission. However, this court takes judicial notice that the decision by the Securities Commission has since been quashed by the High Court following Afrizan's application for judicial review via Judicial Review No WA-25–553–12 of 2019.

[81] In the circumstances, this court after giving due consideration to all of the above factors and issues mentioned therefore hold that the application be allowed and that order in terms be granted for paras 1, 2, 3, 4, 5 and for para 6 with each party to bear their own costs of the application.

[82] Accordingly, encl 24 (application by Liew to, inter alia, strike out encl 1 herein) and encl 64 (application by first to fifth interveners to inter alia set aside encl 1 and the IJM) are hereby dismissed but I hereby order costs to be paid to the applicant (after hearing parties submit in the issue of costs) as follows:

(a) for encl 24:
RM5,000 costs to be paid by the sixth intervener to the applicant; and

(b) for encl 64:
RM5,000 costs to be paid by each of the first to fifth interveners to the applicant, thus totalling RM25,000 costs for encl 64.

[83] Enclosure 20 (application by Loh to commence legal proceedings against Fintree) to be fixed for hearing and submissions unless agreed to by JM.

Application allowed.

Reported by Ahmad Ismail Illman Mohd Razali